DCMD MUSEUM ASSOCIATES SDN

v.

SHADEMAKER (M) SDN BHD (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[ORIGINATING SUMMONS NO: S2-24-426-1997]
21 JUNE 1999

CONTRACT: *Termination - Termination notice - Service by hand - Whether rendered termination of sub-contract unlawful*

This was the defendant's application pursuant to O. 33 r. 2 of the Rules of the High Court 1980 that a preliminary point of law be determined prior to the trial of this action. The preliminary issue was whether the termination of the sub-contract between the plaintiff and defendant was unlawful as the termination notice sent by the plaintiff to the defendant was by hand instead of by registered post as provided for under the terms of the sub-contract.

Held:

[1] The relevant clause in the sub-contract allowed for the notice, which must be in writing, to be "served upon" the sub-contractor at the address given. It was only when no such address was given or if there was a change of address of the sub-contractor and he failed to give notice of such a change, would the court deem that it had been properly sent to the sub-contractor, so long as it was addressed by registered post to the last known address as stated in the sub-contract. In fact the way the clause was worded it would seem that the only mode of informing the defendant where the address was known, was by service upon him and this clearly included service by hand.

[Preliminary objection dismissed with costs.]

Case(s) referred to:
Fajar Menyensing Sdn Bhd v. Angsana Sdn Bhd [1998] 6 MLJ 80 ***(dist)***

Legislation referred to:
Rules of the High Court 1980, O. 33 r. 2

For the applicant/defendant - V Pradhan (SS Tieh with him); M/s Paul Ong & Assoc
For the respondent/plaintiff - CW Teo; M/s Khaw & Hussein

Reported by Sherin Kunhibava

a

JUDGMENT

RK Nathan J:

Facts

b By virtue of a Design and Build Contract dated 13 December 1996, Kuala Lumpur City Centre Berhad appointed DMCD Incorporated and the plaintiff as the main contractors for the design, construction, commissioning and completion of the Petronas Discovery Centre (Petrosains) project. By a letter of award dated 5 February 1997, the plaintiff appointed the defendant as sub-
c contractor for the Proposed Construction and Completion of the Petrosains, Levels 4 and 5 Petronas Twin Towers, KLCC, Kuala Lumpur, for the sum of RM25,721,508.18. The plaintiff subsequently compiled 4 volumes of the Contract Documents containing all the terms and conditions governing the rights and liabilities of both parties under the sub-contract. These now form the contract between the plaintiff and the defendant.

d

A notice of default dated 23 May 1997 was issued to the defendant by the plaintiff requesting the defendant to remedy all defaults stated therein within 14 days from the date of receipt of the said notice of default failing which the plaintiff would terminate the sub-contract. The said notice of default was
e despatched "By Hand". In response to the said notice of default, the defendant, by letter dated 27 May 1997 denied the alleged defaults. After much correspondence the plaintiff issued a notice of termination dated 10 June 1997. The said letter was also sent "By Hand". The defendant replied by way of a letter dated 10 June 1997 refusing to accept the plaintiff's repudiation of the
f sub-contract.

On 13 June 1997, an *ex parte* interim injunction was granted by this court restraining, *inter alia*, the defendant from being on the construction site.

The Application

g This is the defendant's application pursuant to O. 33 r. 2 Rules of the High Court 1980 that a preliminary point of law be determined prior to the trial of this action.

The Preliminary Issue

h The preliminary issue in question is *inter alia* whether the termination of the sub-contract by the plaintiff was unlawful in view of the non-compliance by the plaintiff as to the mode of service of the termination notice dated 10 June 1997 in that the termination notice in question was sent to the defendant by hand instead of by registered post as provided for under the terms of the sub-
i contract.

Findings Of The Court

The defendant was of the view that if I accepted its submission that the notice of termination dated 10 June 1997 which was dispatched by hand is bad in law as not having conformed with cl. 32 of the sub-contract which requires service by registered post, then there would be no need for this court to go through a full-bloomed trial with 19 volumes of Common Agreed Bundles of Documents to wade through and for the court to listen to 8 witnesses for the plaintiff and 6 for the defendant. If I was with the defendant on this submission the plaintiff's claim would be dismissed and the matter referred to the learned Senior Assistant Registrar for assessment of damages. The defendant relied on *Fajar Menyensing Sdn Bhd v. Angsana Sdn Bhd* [1998] 6 MLJ 80 where my learned brother, Nik Hashim J said at p. 87 as follows:

> ... The contract in the instant case is a standard form contract which the plaintiff and the defendant chose to use, and as such, they are bound by its provisions. Clause 25(1) clearly stipulates that the architect's default notice and the defendant's notice of termination are to be given to the plaintiff by "registered post or recorded delivery". Since recorded delivery service is non-existent in Malaysia, it is therefore to be disregarded. Service by hand is not a recorded delivery. Neither is it provided for in the contract. Thus, the only service that is left available and practical which is required by cl. 25(1) is by means of registered post. So following the cases of *Ericksson* and *Central Provident Fund Board* and the preferred view of Prof Vincent Power-Smith, I hold that the mode of service by registered post should be strictly observed. It is a mandatory requirement and hence obligatory on the part of the respondent to follow it. Failure to comply with the prescribed mode of service is fatal. Service by any other means other than by registered post is invalid.

The relevant clause dealing with notices and claims in respect of this sub-contract, is cl. 32.1. The said clause reads as follows:

> 32. **Notices And Claims**
>
> All notices shall be in writing. The Sub-Contractor shall notify the Main Contractor and the Employer's Representative an address where written notices and instructions of the Main Contractor and the Employer's Representative under the Sub-Contract may be served upon him and shall inform the Main Contractor and the Employer's Representative of any change in his address. In the event of the Sub-Contractor failing to notify the Main Contractor and Employer's Representative of such an address or any change in his address, such written notices and instructions shall be deemed to have been served upon the Sub-Contractor if they are sent to him by registered post to the address stated in the Sub-Contract or if they are left at his office on the Site and an acknowledgement of receipt thereof is obtained from or on behalf of the Sub-Contractor.

It is apparent therefore that this clause allows for the notice which must be in writing to be "served upon" the sub-contractor at the address given. It is only when no such address is given or if there is a change of address of the sub-contractor and he fails to give notice of such change, the court will deem it that it has been properly sent to the sub-contractor, so long as it is addressed by registered post to the last known address as stated in the sub-contract. There is a clear difference between this case and in *Fajar Menyensing Sdn Bhd.*

Besides it is my view that so long as the sub-contractor has received the letter dated 10 June 1997 which was dispatched by hand, and indeed as he had in fact immediately on the same day, replied the said letter by refusing to accept the plaintiff's repudiation or termination of the sub-contract, it is my judgment that it is a bit too late in the day for the defendant to take up this issue even assuming the defendant is right to take up this argument at all, which I have already held he cannot, because of the explicit provision for service of the notice on him. In fact the way the clause is worded it would seem that the only mode of informing the defendant where the address is known, is by service upon him and to my mind such a mode of service, clearly includes service by hand.

The preliminary objection is hereby dismissed with costs.